



THE COURT OF APPEAL

Neutral Citation No. [2022] IECA 200
Court of Appeal Record No. 188/2020

**President
Edwards J
McCarthy J**

BETWEEN/

**THE PEOPLE (AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS)**

PROSECUTOR/RESPONDENT

-AND-

EDWARD MCDONNELL

ACCUSED/APPELLANT

JUDGMENT (*ex tempore*) of the Court delivered by Mr Justice McCarthy on the 30th day of June 2022

1. This is an appeal against the severity of sentence imposed in the Special Criminal Court on the 31st of August 2020 on Bill No: SCDP0004/2020. Edward McDonnell, the appellant herein, pleaded guilty to one count of unlawful possession of a firearm contrary to section 27A(1) of the Firearms Act 1964, as substituted by Section 59 of the Criminal Justice Act 2006 and as amended. This offence carries a maximum custodial sentence of fourteen years. The appellant entered a guilty plea on the fifth day of his trial, after the close of the prosecution case and after an application for a directed verdict. The judges imposed a sentence of nine years imprisonment backdated to the 16th of September 2019 when the appellant first entered custody.
2. We will now briefly outline the facts of the matter. The offence occurred on the 14th of September 2019 at Lein Park, Harmonstown, Dublin 5, Co. Dublin. The appellant was 55 at the time of the offence and was joined in the matter with one co-accused, one Stephen Little. A surveillance operation had been established by the Garda National Drugs and Organised Crime Bureau in the days prior to the offence in the Coolock area of Dublin. One particular stationary vehicle in the Lein Park area aroused suspicion - a dark blue Audi vehicle with a registration number of 02-D-81655 (a registration number that emerged to be false). Surveillance of the vehicle was maintained and initially no one was observed

coming or going to the vehicle. On the 13th of September, a decision was made to undertake a search of the vehicle. The vehicle was found to be unlocked and a firearm was found under the passenger seat. This firearm was found to be in a loaded state, and it was briefly removed by Gardaí and unloaded, was returned and surveillance of the vehicle was maintained.

3. Gardaí were also monitoring another vehicle, a Toyota Avensis, with a registration number of 07-D-42711. On the 14th of September, this was seen being driven by the appellant's co-accused, one Stephen Little, to the area where the Audi was parked. Surveillance continued and the appellant, Edward McDonnell, was observed exiting the Avensis and going to the stationary Audi. He was seen *"bending down to the driver's wheel of that vehicle, taking something from the wheel"* and a decision was made at approximately 3.35pm to intercept both vehicles. The appellant was arrested at the driver's side of the Audi and during this process, a number of items fell to the ground, to include two balaclavas, two black baseball caps and two pairs of gloves as well as a red petrol can. There were also items of clothing in a shopping bag in the passenger seat and the firearm remained where it was. Gardaí also intercepted the Avensis vehicle which was disabled after a failed attempt to flee the scene and the appellant's co-accused was also arrested. On arrest, Mr Little was noted as having said: *"Had you given me another hour I would have killed the bastard that killed him. I've lost my marriage and my son"* and later at Clontarf Garda Station: *"Why didn't you let it go another hour?"*. The appellant was interviewed on several occasions, but he was not cooperative. During those interviews, he merely indicated that he had come to Dublin to buy a car and denied any knowledge of the firearm and the other items recovered.
4. Gardaí examined the firearm recovered in the Audi. It was described as a Grand Power G9 machine pistol in good condition with its serial number removed. This firearm was found to be capable of either semi or fully automatic fire and there was also recovered a magazine and 12 rounds of 9-millimetre calibre ammunition, consistent with the machine pistol itself. Furthermore, a Nokia mobile phone was recovered from the appellant, with two numbers saved in its contacts under the initials J and S. These were subsequently found to match the numbers associated with two Nokia mobile phones recovered in the Avensis vehicle.
5. Counsel for the appellant in their plea in mitigation emphasised as the principal mitigating factors additional to the plea the appellant's difficulties since an early age, his addiction issues as well as his lack of a formal education and the fact of family support and that he was the father of a young child. The appellant had 47 previous convictions, mainly for road traffic offences; however, he also has a recent conviction from the 22nd of February 2017 in Dublin Circuit Court, where he was sentenced to four years and six months imprisonment with 12 months suspended, for attempted robbery. The appellant was also sentenced in Dublin Circuit Court to two years and six months imprisonment for robbery on the 28th of June 2013. The appellant was first convicted in the Children's Court in 1978 at the age of 14. Counsel for the appellant stressed *"the plea that has been entered is of particular value in this case and if one looks at section 29 of the Act, the Court is obviously obliged to consider not just the timing of the plea but the circumstances of the plea as well and ... in*

those circumstances, that the plea is one which would attract a significantly greater discount than it might otherwise have done."

6. In considering a headline sentence and having regard to the aggravating factors to the offence in question, the Court found: -

"It is clear that the facts and circumstances surrounding the finding of the firearm in question, that the possession thereof sprang from serious and organised criminality. The facts and circumstances exhibit close proximity on the part of both accused to the intended causation of death or serious harm. The firearm was of a lethal variety and was loaded with a magazine and was ready for immediate use before being disarmed by the Gardaí during their operation. The conduct of both men was clearly intentional, planned and was not spontaneous. Actual harm was only prevented due to the timely intervention of the Gardaí. On the basis that the offence is at the lower end of the higher category of such offences, we are satisfied that the pre mitigation headline sentence in each case is 10 years imprisonment."

7. As to the mitigating factors, the Court observed that: -

"...in comparison to Mr Little, the room for mitigation is severely limited in Mr McDonnell's case. There are no specific or personal circumstances relevant to his motivation for committing this crime. This motivation remains opaque, as does his intended role in the events that would have unfolded absent the garda intervention. The best that can be said about his likely involvement is that in the light of the fact that he brought two sets of clothes to the car, it is not clear whether he was to be the gunman or simply a getaway driver."

8. The Court determined that the appellant did not have the benefit of the mitigating factors that were available to his co-accused. In Stephen Little's case the headline identified was ten years, a period of eight years was arrived at to represent mitigation due to his much earlier plea of guilty and a further 25% discount applied in recognition of further mitigating factors, the end result being a sentence of six years. The factors available to the co-accused included the absence of previous criminal involvement (he had no previous convictions save for one road traffic offence) positive personal testimonials and the tragic death of his son by a crime of violence has had adverse effects and his medical condition (which he explained to Gardaí upon his arrest) and proved to be significantly cooperative which strengthened the case against him.

9. Regarding the appellant "*the only factor of substance*" was that he entered a guilty plea. In this regard, the Court held that "*we have repeatedly emphasised that full credit of the order of 25% can only arise in respect of a plea that is timely or has other significant value. In Mr McDonnell's case, neither of these considerations arise.*" On foot of this, the Court limited mitigation on this basis to one of a 10% reduction to the sentence imposed reducing the overall sentence from a headline of ten years to one of nine years imprisonment.

Grounds of Appeal

10. The grounds of appeal advanced by the appellant are as follows: -

- a. *The learned sentencing Judges erred in terms of their assessment of the appropriate headline sentence and the mitigation discount to be applied;*
- b. *The learned sentencing Judges erred in law and principle in failing to afford a greater discount or give adequate credit or weight to the appellant's guilty plea and the circumstances in which it arose;*
- c. *The learned sentencing Judges failed to have any or any sufficient regard to the principles of parity in sentencing and by doing so allowed a sentence which was disproportionately in excess of his co-accused to be imposed;*
- d. *The learned sentencing Judges erred in law in failing to structure a sentence balancing punitive, deterrent, and rehabilitative elements, and in failing to structure a sentence proportionate to the circumstances of the offender;*
- e. *The learned sentencing Judges sentenced the appellant to a term of imprisonment which was excessive and unduly harsh;*
- f. *In all of the circumstances, the learned sentencing Judges erred in law.*

We will deal with all grounds together. The appellant's argument ultimately pertains, in our view, to the principle of parity with the sentence imposed on his co-accused, and additionally, having regard to the fact, it is contended, that certain mitigating factors were present but not taken into account.

11. Counsel for the appellant argue that there is too great a disparity between the sentence ultimately imposed on the appellant, being one of nine years, and that of his co-accused, being one of six years. Counsel point to what they say are further mitigating factors. Counsel also accepts that a degree of discretion is vested in a judge, but it should be incremental and here the disparity is such to create an error in principle.

12. While the Court suggested that "*none*" of the mitigating factors identified in relation to Mr Little arose for the appellant, it was submitted here that this was an error and the fact that different or distinct mitigating factors applied to Mr Little should not have resulted in a "*straight discount*" of only 10%. The factors for which Counsel contend were not sufficiently taken into account by the judge were as follows: -

- i. The conduct of the defence resulted in the matter proceeding expeditiously, prior to reaching a point where a direction application was made, and as a consequence of what had preceded, the prosecution was satisfied to accept a plea to a lesser count;
- ii. The plea of guilty itself;
- iii. The absence of any involvement in the organisational or logistical planning of the offence itself prior to his involvement on the day in question;

- iv. The absence of relevant previous convictions;
 - v. The appellant's difficulties with drugs, and the fact that he is currently providing clean urine samples;
 - vi. The fact that he is a father of three together with his personal circumstances;
 - vii. The difficulties that the appellant had since an early age;
 - viii. The appellant's lack of formal training or education.
13. A court should, where possible, impose a sentence in accordance with the general principles of parity. Those principles are well-established and in *DPP v O'Driscoll* [2019] IECA 315, at paragraph 13, this Court noted: -

"There does not seem to be any significant difference between counsel as to the broad principles to be applied. It is accepted that, generally speaking, the principles applicable to parity of sentencing for co-defendants are well settled going back to the People (D.P.P.) v. Poyning [1972] I.R. 402. Those principles suggest that, all things being equal, co-offenders should, in general, receive comparable sentences as noted by Edwards J. in the People (D.P.P.) v. Norton [2015] IECA 276."

14. In *O'Driscoll*, at paragraph 15, this Court further stated: -

"It thus seems clear that a sentencing court will require an appropriate reason to differentiate between co-accused but that such reasons can often be found in the kind of factors identified in O'Malley. It follows that the issues in this case really turn on whether the factors identified by the sentencing judge in this case justify the distinction between the two sentences imposed."

15. Counsel for the respondent retort that the approach adopted by the sentencing judges was entirely appropriate in considering and in giving adequate weight to the differences in personal circumstances and the respective roles of the appellant and his co-accused. Furthermore, they submit that the appellant cannot purport to have a justifiable sense of grievance as the sentence he received was a proportionate and appropriate one which took into account his particular circumstances, and that this is so, irrespective of any penalty imposed on the co-defendant. The point was reiterated in *People (DPP) v Cunningham* [2015] IECCA 2 at paragraph 2.16: -

"However, an appellate court, in adjusting a sentence to attempt to remove what it has found to be an unjustified disparity, cannot alter the sentence imposed on the appellant to such an extent that the new sentence would itself meet the criteria for undue leniency. To take such a course of action would be to displace one potentially unjustified approach with another equally unjustified sentence."

16. We think that there is no basis for suggesting that the disparity in sentence could give rise to sense of grievance or was in any way unjustifiable. Firstly, the appellant pleaded guilty

only during the course of the trial whereas his co-accused pleaded at a much earlier stage. On the state of the evidence as it existed at the time when the cars were stopped, the protagonists arrested, and the cars searched, the importance of admissions at the scene strengthened the case as did admissions in Garda custody. The appellant made no such admissions. He has 47 previous convictions and as the Court viewed "*significant previous convictions spanning a long period of time*". These included the convictions of an attempted robbery and robbery – crimes of violence, and he also had a sexual assault and assault causing harm conviction from the Central Criminal Court in November 2004. Apart from aggravation due to convictions for offences of violence he does not enjoy mitigation on the basis of past good character. The co-accused further had suffered the recent death of his son in tragic circumstances; whilst the courts cannot permit vengeance or vigilantism, the tragedy of his son's death remains.

17. Having regard to the lateness of the plea, the Court was right to reduce the headline sentence by one year only. The Court was right to take the view that the mitigating factors present in favour of the appellant other than the plea were minimal; in our view those outlined do not amount at the end of the day to factors of such strength as to displace the view of the trial judges. Both were fortunate that a higher headline sentence was not identified, and the co-accused was the beneficiary of a generous approach to mitigating factors other than the plea.
18. The fact remains, however, that the disparity between them was sufficiently significant to warrant a more lenient sentence in the case of the co-accused and that taking the matter in the round, by whatever route, the appellant could not reasonably expect a lesser sentence than nine years imprisonment for an offence of such seriousness. We do not think that the mitigating factors additional to the plea in his case, with special reference to his age (57 years old) or family circumstances, nor, indeed, difficulties in life from the age of 14 or any addiction issues raised could mean that it would have been appropriate to impose a lesser term of imprisonment.
19. We therefore dismiss this appeal.